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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 175

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

FEDERAL HOME LOAN BANK BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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FEDERAL HOME LOAN BANK BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Beacon Federal Savings and Loan Association (herein referred to as Beacon) prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered May 6, 1959, which affirmed the judgment, in favor of the defendant-respondent, of the United States District Court for the Eastern District of Wisconsin in an action brought by Beacon to have declared invalid certain orders of the Federal Home Loan Bank Board (herein referred to as the "Board"), by which the Board appointed a Supervisory Representative in Charge of, and subsequently a conservator for, Beacon.

OPINIONS BELOW.

The opinion of the District Court, rendered May 28, 1958, is reported in 162 F. Supp. 350, and is printed in Appendix C hereto. The opinion of the District Court on the petition for fees and expenses, rendered August 28, 1958, is reported in 165 F. Supp. 124, and is printed in Appendix E hereto. The opinion of the Court of Appeals for the Seventh Circuit, dismissing the appeal, rendered May 6, 1959, is unreported as yet, but is printed in Appendix G hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit, which is sought to be reviewed here, was entered May 6, 1959, at Chicago, Illinois. A timely petition for rehearing in the Court of Appeals was filed May 19, 1959, and rehearing was denied June 2, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED BY THIS PETITION.

1. Whether or not the Court of Appeals decided the federal question of timeliness of the appeal in a way in conflict with the applicable decision of the Supreme Court.

2. Whether or not the appointment, without notice and in the absence of an emergency, of a Supervisory Representative in Charge, was in violation of the applicable federal statute, 12 U. S. C. 1464(d).

3. Whether or not the appointment of a conservator for a solvent institution, when the applicable statute provides an alternate and effective but less severe remedy, was error;

4. Whether or not the Board's actions in this case deprived Beacon of the due process of law required by amendment 5 to the Federal Constitution.

STATUTES INVOLVED.

The statutory provisions involved are sections 5(d)1 and 5(d)2 of the Home Owners Loan Act of 1933, as amended (also cited herein as 12 U. S. C. 1464(d) (1) and 12 U. S. C. 1464(d) (2)), which are printed in Appendix I hereto, and section 10(c) of the Administrative Procedure Act (also cited herein as 5 U. S. C. 1009(c)), which is printed in Appendix J hereto. Section 5(d) of the Home Owners Loan Act, as it appeared before it was amended in 1954, is printed in Appendix H hereto.

STATEMENT OF THE CASE.

On March 20, 1956, by its order No. 9414, the Board appointed a Supervisory Representative in Charge of Beacon, which promptly filed an action in the District Court for the Eastern District of Wisconsin to have this appointment declared invalid. By a decision rendered August 14, 1956, and reported in 143 F. Supp. 534, this action was dismissed for lack of jurisdiction on the ground that it had been brought before the exhaustion of administrative remedies. This dismissal was not appealed, and is not now in issue.

On May 20, 1957, the Board, by its order No. 10,736, confirmed its previous appointment of a Supervisory Representative in Charge and appointed a conservator for Beacon. On May 29, 1957, Beacon brought an action in the District Court for the Eastern District of Wisconsin to have these appointments and various other orders of the Board declared invalid. Both Beacon and the Board moved for summary judgment, and the Board's motion was allowed by an opinion rendered May 28, 1958, reported in 162 F. Supp. 350, and printed in Appendix C hereto.

On June 9, 1958, an "Order for Judgment," printed in Appendix D hereto, was signed by the district judge and entered by the clerk.

Subsequently, counsel for Beacon petitioned the District Court for the allowance of fees and expenses, and the Court entered an opinion, printed in Appendix E hereto, dismissing this petition on August 28, 1958. On September 3, 1958, the clerk entered judgment, printed in Appendix F hereto, dismissing Beacon's complaint on the merits.

On September 4, 1958, Beacon filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit and on May 6, 1959, this Court of Appeals rendered a decision, printed in Appendix G hereto, dismissing, on the merits, so much of the appeal as related to the petition for attorneys' fees, and dismissing the remainder of the appeal on the ground that notice thereof had not been timely filed.

Jurisdiction of the District Court was based upon the provisions of 28 U. S. C. 1331.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Decided the Federal Question of Timeliness of the Appeal in a Way in Conflict With the Applicable Decision of the Supreme Court.

The chronology of the events involved in this appeal is as follows:

a. On May 28, 1958, the District Court rendered its opinion denying Beacon's motion for summary judgment, granting the Board's motion for summary judgment, and directing the Board to prepare an order in conformity with the opinion.

b. On June 9, 1958, the district judge signed and the clerk entered an "Order for Judgment," which had been prepared by counsel for the Board.

c. On June 9 and July 16, 1958, conferences were held among the Court, counsel for the Board and counsel for Beacon, with respect to delaying entry of final judgment until the matter of allowance of attorneys' fees had been adjudicated, and it was agreed that entry of judgment should be so delayed.

d. On July 10, 1958, counsel for Beacon petitioned the District Court for the allowance of attorneys' fees.

e. On August 28, 1958, this petition was denied.

f. On September 3, the clerk entered a "Judgment" dismissing Beacon's petition and complaint pursuant to the June 9 "Order for Judgment."

g. On September 4, 1958, Beacon filed a notice of appeal to the Court of Appeals for the Seventh Circuit.

The Court of Appeals, in dismissing the appeal as not having been timely filed, based its action on the recent case of *U. S. v. F. & M. Schaefer Brewing Co.*, 356 U. S. 227 (1958). However, under a closer analysis of the facts and rule of that case, it may be shown that the appeal herein was timely filed.

In that case, the F. & M. Schaefer Brewing Co. brought an action in the District Court for the Eastern District of New York to recover certain stamp taxes which it alleged had been erroneously paid. On April 14, 1955, the district judge filed a brief opinion in which he specified the amount of taxes and interest paid by the plaintiff, and granted the plaintiff's motion for summary judgment, but did not specify the date on which the taxes had been paid. Thereafter, there were no further proceedings in the case until May 24, 1955, when counsel for the plaintiff presented to the judge a document captioned "Judgment." This judgment, which specified exactly the amounts to be recovered, was signed by the judge the same day. Both the April 14 opinion and the May 24 judgment were entered by the

clerk. Within 60 days of the May 24 judgment, but more than 60 days after the April 14 opinion, the Government filed a notice of appeal, which the Court of Appeals for the Second Circuit dismissed, on the ground that it had not been filed in time. The Supreme Court reversed and stated the general rule that a judgment is final when it embodies the essential elements of a judgment and clearly evidences the judge's intention that it be his final act in the case.

In the present case, the district judge clearly evidenced his intention that the June 9 "Order for Judgment" was not his final act in the case. He participated, at the time of and after the June 9 order, in conferences with the parties, looking toward the withholding of entry of judgment until the matter of attorneys' fees could be adjudicated. Had the judge intended that order to be final, he would have advised the parties that the case had been completed and that their agreement to withhold entry of judgment was futile. Since the judge participated in these conferences without so advising counsel for Beacon, he must not have intended his June 9 order to be final. At the time of these conferences, Beacon had ample time to perfect an appeal if the judge had intended his June 9 order to be final. Also, he took under consideration the petition for attorneys' fees, which he could have done only if the case had not been previously disposed of by a final judgment, and this petition was denied on the merits, not on the ground that the case had previously been disposed of by a final order. In dismissing the petition, the district judge stated: "The Court does not find that this action was brought by the plaintiff in bad faith. Plaintiff had a right to have the action of the defendant reviewed by the Court." The judge treated the action to review the defendant Board's procedures as "this" action, in which he was then giving his decision, and which therefore must have continued until that time. This would be possible only if the action had

not previously been terminated by the entry of final judgment. Further, had the district judge intended the June 9 order to be final, there would have been no need to enter the September 3 judgment, since the case would have been completed in June. Indeed, it would have been improper to enter any other final judgment in the case had the June 9 order been final.

The Board also understood that the district judge did not intend his order of June 9 to be final, as is clearly evidenced by its actions. The Board, in its letter of June 11, 1958, consented "to the withholding of entry of judgment," which would have been possible only if judgment had not by then been entered. Also, the Board, in its letter of July 23, 1958 was very careful to preserve any objections it might have had to the timeliness of the appeal, but even with this caution, the Board again consented to withholding entry of judgment, which would have been possible only if a judgment had not previously been entered. While the Board was anxious to protect any objections it may have had to timeliness of the notice of appeal, the fact that no final judgment had been entered, which fact was recognized by the Board, settled the matter, since the time for filing a notice of appeal depends upon the entry of a final judgment, whenever that may be. The above correspondence was added to the record by the Association's answer to motion to dismiss appeal, filed October 27, 1958.

It might be added that, since the Board drafted the June 9 order, it would have been perfectly simple for it to have referred to the order as a "Judgment," rather than "Order for Judgment," if it had so intended.

Further, the terms of the order and judgment involved show that the September 3 judgment was the final judgment in the case. The June 9 order was entitled "Order for Judgment," and the September 3 "Judgment" specifically made reference back to the prior entry of June 9, stating

it to be an "order" rather than a judgment. The September 3 judgment treated the June 9 order as the basis of the dismissal on September 3, which would have been possible only if the June 9 order was not in itself a dismissal.

It is possible that the Court of Appeals was led to its misinterpretation of the *Schaefer* case by a failure carefully to analyze the nature of a "final judgment." It is clear that an appeal may be taken only from a final judgment, and in this case the Court of Appeals allowed and considered on the merits the appeal from the September 3 judgment. Thus, the court necessarily treated that judgment as a final judgment.

It is also clear that in a single action there may be but a single final judgment, and it is uniformly presumed that a court will not do an act which would be a nullity. If the June 9 order had been intended by the trial court as final, the September 3 judgment would have then been a nullity, since the case would by then already have been disposed of by a final order. However, if the September 3 judgment were final and the June 9 order were interlocutory, then both would be effective. Accordingly, in order to give effect to both the District Court's rendering the September 3 judgment, and the Court of Appeals' action in reviewing it, the September 3 judgment would have to have been the final judgment in the case.

If the Court of Appeals were to assume that the June 9 order had been the final judgment in this case, then that Court's only proper course would have been to treat the September 3 order as a nullity (and thus decline to review it on that ground), since, under that assumption, it would have been entered after the case had been disposed of by a final judgment.

In effect, however, the Court of Appeals, by entertaining an appeal from the September 3 judgment, necessarily decided that it, rather than the June 9 order, was the final

judgment in the case. In that event, the appeal was timely filed.

In applying the *Schaefer* rule to the present appeal, an important difference between the two cases must be noted. In *Schaefer*, no further proceedings were had after the first order was entered on April 14, and this time seems to have been used to prepare a judgment for entry by the court. In the present case, however, litigation continued after the June 9 order, since the court was then considering the petition for attorneys' fees. Unlike *Schaefer*, the parties here did not merely stand by after the June 9 order, waiting for a judgment to be drafted, but instead actively continued in the trial of the case.

Similar to the situation in *Schaefer*, all those concerned here intended and indicated that the June 9 order was not a final judgment but that the subsequent judgment of September 3 was:—the district judge by participating in the "delaying entry" conferences; counsel for both the Board and Beacon by attending the conferences and agreeing that entry of judgment should be delayed; counsel for Beacon by petitioning for the allowance of attorneys' fees; the district judge by dismissing this petition on its merits and not on the ground that final judgment had been entered; and, finally, the clerk by entering the judgment on September 3.

II.

The Appointment, Without Notice and in the Absence of an Emergency, of a Supervisory Representative in Charge Was in Violation of the Mandatory Provisions of the Applicable Federal Statute, 12 U. S. C. 1464(d).

The original Section 5(d) of the Home Owners Loan Act of 1933 (before its amendment in 1954) provided as follows:

"The Board shall have full power to provide in the

rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

This section gave the Board blanket power to appoint conservators and receivers and to liquidate federal savings and loan associations. Under this statute, the Board was given only these means of enforcement, and had no power to enforce its decisions by order. Further, this section did not require that the Board state the grounds for its actions, and made no provisions for judicial review.

This provision of law was upheld by the courts, but the chaos, the abuse of federal administrative power, and the imposition upon private parties and institutions which resulted are illustrated by the only case decided under that provision of law, the tortured history of which we cite as follows:

Mallonee v. *Fahey*, 68 F. Supp. 418 (1946).

Fahey v. *Mallonee*, 332 U. S. 245, 67 S. Ct. 1552 (1947).

Ex Parte Fahey, 332 U. S. 258, 67 S. Ct. 1558 (1947).

Home Loan Bank Board v. *Mallonee*, 196 F. 2d 336 (1952).

Fahey v. *O'Melveny & Myers*, 200 F. 2d 420 (1952).

Mallonee v. *Fahey*, 200 F. 2d 918 (1952).

Mallonee v. *Fahey*, 117 F. Supp. 259 (1953).

Fahey v. *Calverley*, 208 F. 2d 197 (1953).

Federal Home Loan Bank of San Francisco v. *Long Beach Federal Savings & Loan Association*, 122 F. Supp. 401 (1954).

Mallonee v. *Fahey*, 122 F. Supp. 472 (1954).
Federal Home Loan Bank Board of San Francisco v. *Long Beach Federal Savings & Loan Association*, 122 F. Supp. 960 (1954).

As a result of this extended litigation, Congress repealed this section in 1954, and replaced it with a section which specifically set out the procedures the Board was to use, and gave it power to enforce its orders without the necessity of seizing solvent institutions. This amended section (the full text of which is printed in Appendix I hereto) provides in part:

> "d(1) * * * It [the Board] shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (2) of this subsection. Such association shall have 30 days within which to correct the alleged violation of law or regulation and to perform any legal duty. * * *"

However, in the present case, the Board did not follow the prescribed procedure of notice and a hearing. Instead, the Board merely alleged, but did not prove, the existence of an emergency, and proceeded to appoint a Supervisory Representative in Charge.

The amended statute, 12 U. S. C. 1464(d)2, permits such appointment only in the event that an emergency exists. However, it is undisputed that Beacon was solvent at all times, that it had never suffered a loss, and that all the facts on which the Board's action was based had been known to it for several months before the action was taken. Since the Board was well aware of the situation beforehand, and there was no danger of a change in Beacon's condition, there could not have been any "emergency" to justify its

ex parte seizure. Nowhere in the entire record has the Board specified the facts which constituted the alleged "emergency."

That the amended section (d)1 is mandatory, is clear from its terms, which provide that the Board "shall" take prescribed action. However, it is clear that the Board, the trial court and the Court of Appeals in this case have ignored the mandatory language of the amended section (d)1. This is illustrated by the fact that the Court of Appeals in this case cited, on the merits, the case of *Greater Delaware Valley Federal Savings and Loan Association v. Federal Home Loan Bank Board*, 262 F. 2d 371 (1958). That case, however, was inapplicable, as it decided merely that the association involved had no standing to sue in the federal court until it had exhausted its administrative remedies. This disregard of a specific statutory amendment is also illustrated by the fact that the District Court relied on *Fahey v. Mallonee*, 332 U. S. 245 (1947), which was decided under the law before it was amended to prevent just that kind of situation from arising again.

The Board attempted to justify the appointment of a Supervisory Representative in Charge on the ground that its discretion in so doing is not subject to judicial review. To contend that the Board may, in total disregard of law and the rights of persons involved, seize an association without judicial accountability therefor, not only flies in the face of reason, but is contrary to the express terms of Section 10(e) of the Administrative Procedure Act, 5 U. S. C. 1009(e), which provides, in pertinent part:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."
>
> * * * * * * *
>
> "(e) Every agency action made reviewable by statute and every final agency action for which there is

no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *"

III.

The Appointment of a Conservator for a Solvent Institution, When the Applicable Statute Provides an Alternate Remedy Which Is Effective But Less Severe, Was Error as a Matter of Law.

That it is error to appoint a receiver if the alleged wrongs can be otherwise corrected is an elementary principle of equity, and is amply supported by the cases and texts. In *Feess v. Mechanics' State Bank*, 84 Kan. 828, L. R. A. 1915A 606 (1911), the court, in reversing the appointment of a receiver, said, at 84 Kan. 836:

> "It [the appointment of a receiver] is a last-resort provision and is only to be employed where there is a pressing necessity and no other adequate remedy is afforded."

In *Indianapolis Dairymen's Co-op. v. Bottema*, 226 Ind. 237 (1948), the court, in reversing the appointment of a receiver, quoted 16 Fletcher's Cyclopedia of the Law of Private Corporations, section 7697 with approval, as follows:

> "The power of appointment is a delicate one, and to be exercised with great circumspection. Indeed, the courts have held repeatedly that the power to appoint a receiver should be exercised with great care and the utmost caution and only in case of an emergency, and in a clear case, or in a case of 'extreme necessity,' where it appears that the appointment is necessary either to prevent fraud or to save the property from injury or threatened loss, or destruction, and more especially is this true where the corporation is solvent,

or the defendant corporation is a bank. This is the rule with respect to injunctions; it applies *a fortiori* with respect to the appointment of a receiver.

"The same rules are enunciated in Pomeroy's Equity Jurisprudence (4th Ed.), section 1484 *et seq.*, where it is said that the power should be exercised with great caution and never indulged unless the danger of loss or injury is imminent. 'A receivership is not a panacea for all business ills. The remedy may be worse than the disease. Even the suggestion of a receivership, as all know, may cause capital to hide in its shell.' As one court has expressed it: 'A receivership is the most drastic remedy and the most expensive luxury known to the realm of the law.'"

In 45 Am. Jur. Receivers, section 26, the general rule is given:

"In other words, a receivership is regarded as a remedy of last resort."

And in 9 C. J. S. Banks & Banking, section 491, it is stated:

"It [appointment of a receiver for a bank] should be made only in case of absolute necessity, to protect the rights of the parties and preserve the property, and where there is no other adequate remedy * * *."

Again, it must be noted that the Home Owners Loan Act of 1933, as amended in 1954, not only contains specific provision for enforcement by means other than seizure, but in addition, this amendment was made in order to eliminate the unfettered power the Board had previously had to seize associations.

As no emergency existed, and the statute provided an effective but less drastic remedy, the appointments of the Supervisory Representative in Charge and of the conservator, were reversible error as a matter of law.

IV.

The Board's Actions in This Case Deprived Beacon of the Due Process of Law Required by Amendment 5 to the Federal Constitution.

Beacon contends that there was a gross abuse of administrative power in this case. It contends that the procedure adopted by the Board denied constitutional "due process of law."

The previous law gave the Board no way to correct wrongs except by seizures and gave blanket power to seize in its discretion. The amendment of 1954 prescribed a specific procedure which the Congress says the Board "shall" pursue in the event of violation of law or regulation. Beacon contends that it is a violation of its constitutional right to due process of law in this case for the Board not to proceed under 5(d)(1) and to proceed under 5(d)(2).

The above propositions are clear, as a matter of law in America, as applied by appellate courts to trial courts and others. It is all the more certain, when an administrative agency having the power to make laws, to prosecute, and to adjudicate, abuses its authority, ignores and fails to give effect to an Act of Congress, and violates its duty to give private parties a right to defend. Such procedure is a violation of Beacon's right to due process of law. In 16A C. J. S. Constitutional Law, section 567, it is said (at p. 540) in reference to due process of law:

> "In the concrete, it means that in a contest involving these rights a person will be accorded the opportunity to contest the propriety of each step in the action sought to be taken against him."

In this case, if the Board had proceeded step by step, as the Congress says it "shall" proceed, Beacon could have defended itself. The courts now say, since the Board sets

a legal trap and prefers a basket of charges, that, on account of its "expertise," the courts will not reverse.

By the procedure prescribed by Congress providing due process of law, the defendant and its officers and owners could have defended themselves. The procedure adopted was adopted by the maker of the rules, the prosecutor and the judge. The procedure adopted amounts to the accumulation of a series of charges and the claim that the aggregate constitutes "unsafe and unsound operation." In the operation of any such large institution, it is possible to accumulate a series of alleged violations of law and regulations. In this case, the agency which made the regulations and made the charges and set this legal trap prosecuted and adjudicated the question, and the trial court says that on account of its expertise, the Court will not interfere. If this is due process, then no financial institution can defend itself against such entrapment.

U. S. ex rel. Accardi v. *Shaughnessy*, 347 U. S. 260 (1954), is a deportation case. The statute gave the Attorney General blanket power to make rules to prosecute, adjudicate and enforce. He voluntarily made regulations and appointed his own board and provided for a hearing before that board and for review by him. The Court held that failure to adopt the procedure provided by such voluntary regulations and to provide a fair trial was a denial of due process of law. At page 268, the Court says:

> "* * * [W]e object to the Board's alleged *failure to exercise* its own discretion contrary to existing valid regulations."
>
> "* * * Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings." [Emphasis in the original.]

Service v. *Dulles*, 354 U. S. 363 (1957), is a case involving discharge from federal service. The Secretary of State had broad power to discharge in his discretion. He voluntarily made regulations and provided for a trial before a board created by him and reviewed by him. The Court held that a failure to follow such voluntary regulations and to provide the hearing there prescribed, was unlawful, citing *Accardi* v. *Shaughnessy*, above. In other words, when law or regulations are made to provide a better process than naked due process, it is a failure of constitutional rights and due process of law not to follow such better procedure. If this is true with respect to regulations, it should be all the more so with respect to an Act of Congress, which has been ignored in the present case.

At page 388 of this case the Court says:

> "* * * While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them."

Williams v. *Kelly*, 133 Fla. 244 (1938), is a case holding that procedure by a city to condemn is not "due process of law" because the procedure adopted by the city and its ordinances do not provide the protection contemplated by the statute authorizing the ordinance and the procedure. That is the situation in this case, where the Congress changed the law and provided a specific administrative procedure and the administrative agency did not give Beacon the benefit of it. This is a denial of due process of law. In *Williams* v. *Kelly* the Court stated, at page 247:

> "* * * [D]ue process of law must be afforded; *and* the proceedings *must* accord with valid statutory requirements; for such proceedings have a legal basis only in compliance with valid statutory provisions con-

ferring the authority. The official act is authorized *only* when the material provisions of the statute authorizing or regulating the action are obeyed." [Emphasis in the original.]

CONCLUSION.

In conclusion, then, Beacon contends that the *Schaefer* case holds that the final order in a case is the order which the trial judge intends to be the final order, and that the judge in this case did not intend his "Order for Judgment" to be a final order, but it was intended that the "Judgment" of September 3 be the final order in this case, and therefore that the appeal filed September 4, 1958, was timely.

Beacon contends, on the merits, that it is reversible error to seize, *ex parte* and without notice, in the absence of emergency, and that there is not a scintilla of evidence of emergency in this case.

Beacon contends that it is reversible error to appoint a conservator or receiver when it is entirely clear that any alleged wrongdoing could have been corrected by a simple order under the specific procedure expressly required by the Congress.

Finally, Beacon contends that the Congress provided an express specific procedure which was not followed and that failure to follow it denied Beacon due process of law.

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STate 2-8420.

APPENDIX A.

FEDERAL HOME LOAN BANK BOARD.

Order No. 9414

Date: March 20, 1956

WHEREAS, in the opinion of the Federal Home Loan Bank Board, grounds exist for the appointment of a conservator for the Beacon Federal Savings and Loan Association, Milwaukee, Wisconsin, which grounds are (1) violation of law and regulations and (2) unsafe and unsound operation in that

(a) said association has made unsecured loans in violation of Section 5(c) of the Home Owners' Loan Act, as amended, and in violation of Part 145 of the Rules and Regulations for the Federal Savings and Loan System;

(b) said association has, in violation of Part 145 of the Rules and Regulations for the Federal Savings and Loan System, made loans for amounts in excess of the maximum percentage of value permitted by regulations;

(c) the executive officers of said association, in violation of their duties and obligations to the association and in disregard of the interests of the association, are using the association for the gain and benefit of themselves and of concerns in which they and their associates have a personal financial interest;

(d) the assets of the association have been and are being wasted and its interests are being jeopardized under agreements entered into with the approval of its board of directors; and

WHEREAS, the Federal Home Loan Bank Board has determined that an emergency exists requiring immediate action for the reason that assets of the association will continue to be wasted and its interest, the interest of its members and of the public jeopardized unless the action herein provided is immediately taken;

NOW, THEREFORE, Thomas M. Flynn is hereby appointed Supervisory Representative in Charge to take charge of the Beacon Federal Savings and Loan Association, Milwaukee, Wisconsin, and its affairs, pending further disposition of said association and its affairs, and, as such Supervisory Representative in Charge, to have and exercise all the powers and rights, enjoy all of the privileges, and assume and perform all of the duties and responsibilities of a conservator accorded or imposed by law, the Rules and Regulations for the Federal Savings and Loan System, and orders issued by the Federal Home Loan Bank Board.

BY THE FEDERAL HOME LOAN BANK BOARD.
/s/ JOHN M. WYMAN,
Assistant Secretary.

APPENDIX B.

FEDERAL HOME LOAN BANK BOARD.

No. 10,736

Date: May 20, 1957

WHEREAS, by Order No. 9414, dated March 20, 1956, the Federal Home Loan Bank Board appointed a Supervisory Representative in Charge to take charge of the Beacon Federal Savings and Loan Association, Milwaukee, Wisconsin, and its affairs, pending further disposition of said Association and its affairs; and

WHEREAS, said Supervisory Representative in Charge took charge of said Association and its affairs on March 20, 1956, and since said date has been and now is in charge thereof; and

WHEREAS, by Resolution No. 9799, dated July 11, 1956, the Federal Home Loan Bank Board directed, pursuant to Section 5(d)(2) of the Home Owners' Loan Act of 1933, as amended, that an administrative hearing be held on the 15th day of August, 1956, in Milwaukee, Wisconsin, on whether said Association has violated law and regulations and was engaging in unsafe or unsound operation as in said Resolution set forth; and

WHEREAS, pursuant to said Resolution a hearing was commenced in Milwaukee, Wisconsin, on August 15, 1956, and concluded on August 22, 1956, before Daniel J. Kelly, a Hearing Examiner, duly appointed pursuant to the provisions of Section 11 of the Administrative Procedure Act and designated by Federal Home Loan Bank Board Resolution No. 9906, dated August 9, 1956, to conduct said hearing, at which hearing the said Association appeared by its

counsel, Horace Russell and Ray T. McCann, and A. Lambert Slocombe, a director of said Association, appeared by his counsel, Alexander Cannon and Earl R. Kuelthau, and at which hearing evidence was adduced both in support of and in opposition to the charges set forth in Resolution No. 9799, and a complete record made of the testimony and evidence adduced at said hearing; and

WHEREAS, within the time permitted by Section 109.8 of the General Regulations for the Federal Home Loan Bank Board each party filed with the Secretary to the Federal Home Loan Bank Board proposed findings and conclusions and brief in support thereof; and

WHEREAS, on February 15, 1957, the said Hearing Examiner filed with the Secretary to the Board his findings, conclusions and recommended decision, copies of which were promptly served on said Association and on A. Lambert Slocombe in accordance with Section 109.9 of the General Regulations for the Federal Home Loan Bank Board; and

WHEREAS, said Association and A. Lambert Slocombe filed exceptions to such findings, conclusions and recommended decision within the time permitted by said Section 109.9 and submitted a request for permission to present oral arguments, which request was granted by the Federal Home Loan Bank Board on March 12, 1957, and oral arguments were heard by said Board on April 19, 1957; and

WHEREAS, the Federal Home Loan Bank Board has considered the entire record in the case, including the transcript of the hearing together with exhibits there introduced, the findings, conclusions, and recommended decision of the Hearing Examiner, the exceptions thereto filed by the said Association and A. Lambert Slocombe, the oral arguments presented, and all briefs and memoranda submitted by the parties; and

WHEREAS, the Federal Home Loan Bank Board has determined and hereby determines and decides from said record that said Association has violated law and regulations and has engaged in unsafe or unsound operation in the particulars and to the extent set forth in Federal Home Loan Bank Board Resolution No. 9799, and that grounds exist for the appointment of a conservator;

NOW, THEREFORE, IT IS HEREBY RESOLVED, That the exceptions filed by said Association and A. Lambert Slocombe to the findings, conclusions and recommended decision of the Hearing Examiner are and each of them is overruled, and the Federal Home Loan Bank Board hereby adopts the findings and conclusions and the reasons therefor of the Hearing Examiner and approves his recommended decision and makes the following additional and supplemental findings and conclusions:

1. Atomic Security Corporation was organized as an intermediary through which dealings between Downtown Development Corporation and Beacon Federal Savings and Loan Association could be transacted and violations of Section 145.10 of the Rules and Regulations for the Federal Savings and Loan System thereby concealed. Atomic Security Corporation was designed as a temporary corporation, to be dissolved and its assets transferred to Downtown Development Corporation when the transactions between it and the Beacon Federal Savings and Loan Association were completed.

2. The sale of Beacon Federal Savings and Loan Association's office building at 769 North Water Street, Milwaukee, Wisconsin, to Trans-America Enterprises, Inc., was part of a series of transactions involving Trans-America Enterprises, Inc., Laniel Realty Corporation, Downtown Development Corporation, Atomic Security Corporation, and the Association by which the Association, under the guise of obtaining new office

quarters, financed the purchase by Downtown Development Corporation of property at Fourth and Wells Street, Milwaukee, the purchase by Atomic Security Corporation of property located at Second and Wells Street, Milwaukee, and the purchase by Downtown Development Corporation of property located at Sixth and Wisconsin Avenue, Milwaukee. The purpose of these transactions was to enrich Downtown Development Corporation and or Atomic Security Corporation at the expense of the Association. Transactions between these corporations and the Association were designedly complex and involved in order to conceal their real purpose.

3. In the transactions involving the property at Fourth and Wells Street, Milwaukee, Downtown Development Corporation, at a cost of less than $60,000 to itself, acquired the property free and clear of all encumbrances through a scheme by which more than $130,000 of Association funds, purportedly disbursed in connection with the purchase or lease of office quarters at Second and Wells Street and Sixth and Wisconsin Avenue, Milwaukee, were diverted to the purchase of said property.

4. The resolutions of the board of directors of the Beacon Federal Savings and Loan Association, dated May 18, 1955, and June 15, 1955, and the lease-option agreement dated August 18, 1955, constituted unsafe and unsound operation, jeopardized the Association's funds and interests, and were a means of employing the Association's facilities, funds, and credit for the benefit of Atomic Security Corporation, Downtown Development Corporation, and Henry M. Blume and Ernst F. Zaeske. The disbursement of $125,000 to Downtown Development Corporation through Sydney M. Eisenberg on June 3, 1955, the disbursement of

$100,000 to Downtown Development Corporation on June 16, 1955, the disbursement of $75,000 to Henry Uihlein Realty Company for the benefit of Atomic Security Corporation on August 1, 1955, and the payment of said total sum of $300,000 under the lease-option agreement of August 18, 1955, for an option to purchase part of the property at Sixth and Wisconsin was a reckless waste of the Association's funds for the benefit of said corporations and persons.

5. Atomic Security Corporation received $25,000 through a scheme by which commission on the sale of the property at Sixth and Wisconsin Avenue was credited to the "escrow" account of the Atomic Security Corporation in the Association. All of this $25,000 properly belonged to the Association and at least $24,000 of this amount was derived from disbursements made by the Association purportedly in connection with the purchase or lease of office quarters at Sixth and Wisconsin Avenue.

6. On April 12, 1956, Henry M. Blume and Ernst F. Zaeske, for the purpose of inducing the Federal Home Loan Bank Board to remove the Supervisory Representative in Charge, submitted to the Federal Home Loan Bank Board statements in writing which contained false representations.

IT IS FURTHER RESOLVED, That it is in the interest of said Association, its members, creditors and the public that a conservator be appointed to take charge of said Association and its affairs, pending further disposition of said Association and its affairs; and

IT IS FURTHER RESOLVED, That John F. Clorus is hereby appointed conservator for the Beacon Federal Savings and Loan Association, Milwaukee, Wisconsin, effective 9:00 A. M., Central Daylight Time, the 4th day of June, 1957, to

take charge at said time of said Association and its affairs, pending further disposition of said Association and its affairs, and as such conservator to have and exercise all the powers and rights, enjoy all of the privileges and assume and perform all the duties and responsibilities of his office accorded or imposed by law, the Rules and Regulations for the Federal Savings and Loan System and orders issued by the Federal Home Loan Bank Board; and

IT IS FURTHER RESOLVED, That the Supervisory Representative in Charge of said Association is directed to surrender control and management of such Association and its affairs to said conservator at the time hereinabove set forth, and to make a full report and accounting to the Federal Home Loan Bank Board.

BY THE FEDERAL HOME LOAN BANK BOARD.

/s/ HARRY W. CAULSEN,

(SEAL) *Secretary.*

APPENDIX C.

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin.

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION, *Plaintiff.*

vs.

FEDERAL HOME LOAN BANK BOARD, *Defendant.*

No. 57-C-121.

OPINION.

The case is before the court on defendant's motion for summary judgment, under Rule 56, Federal Rules of Civil Procedure, filed on July 25, 1957, and plaintiff's similar motion for summary judgment, filed on October 21, 1957. No answer has as yet been filed in the action.

The action is one for declaratory relief, injunction, and review of certain proceedings and orders of the defendant, Federal Home Loan Bank Board, hereinafter sometimes called the Board. It is brought pursuant to the provisions of the Home Owners' Loan Act of 1933, as amended (12 U. S. C. A. 1464(d)(2)), and Section 10 of the Administrative Procedure Act (5 U. S. C. A. 1009), and particularly seeks to have Order No. 10,736 of the Board, appointing a conservator for the Beacon Federal Savings and Loan

Association, hereinafter sometimes called Beacon, declared null and void.

On March 20, 1956 the Board, acting under the provisions of 12 U. S. C. A. 1464(d)(2), issued Order No. 9414 appointing a Supervisory Representative in Charge of Beacon. On August 15, 1956 an administrative hearing was begun in Milwaukee to determine whether grounds existed for the appointment of a conservator. The hearing examiner, in his recommended decision, decided that such grounds did exist, and on May 21, 1957 the Board issued Order No. 10,736 which adopted the recommended decision, made a number of additional findings and conclusions, and appointed a conservator for Beacon. Beacon has filed this suit to review that administrative action.

12 U. S. C. A. 1464(d) provides in pertinent part as follows:

> "(d) (1) * * * It [the Board] shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (2) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. * * * After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of

said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. * * *.

"(2) The grounds for the appointment of a conservator or receiver for a Federal savings and loan association shall be one or more of the following: (i) insolvency in that the assets of such association are less than its obligations to its creditors and others, including its members; (ii) violation of law or of a regulation; (iii) the concealment of its books, records, or assets or the refusal to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Board; and (iv) unsafe or unsound operation. The Board shall have exclusive jurisdiction to appoint a Supervisory Representative in Charge, conservator, or receiver. If in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint ex parte and without notice a Supervisory Representative in Charge to take charge of said association and its affairs. * * * The Board shall have the power to appoint a conservator or receiver but no such appointment of a conservator or receiver shall be made except pursuant to a formal resolution of the Board stating the grounds therefor and except notice thereof is given to said association stating the grounds therefor and until an opportunity for an administrative hearing thereon is afforded to said association. Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. * * *"

A number of legal points, exclusive of the merits of the case, have been raised. Beacon claims that the Board's

summary and *ex parte* action, under 12 U. S. C. A. 1464 (d)(2), in appointing a conservator was an abuse of discretion. More specifically, it is contended that the Board abused its discretion in proceeding under 12 U. S. C. A. 1464(d)(2) rather than under 1464(d)(1), under which Beacon would have been given notice of alleged violations and opportunity to correct them before further and more severe action would be taken.

An examination of 1464(d)(1) and (2), reveals that on its face the statute gives the Board an absolute discretion to proceed under either 1464(d)(1) or 1464(d)(2), if, in the latter instance, "in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, * * *."

The decision of the Board to proceed under 1464(d)(2) is not reviewable as such. The statute provides for judicial review at the conclusion of the administrative hearing. At that time a determination is to be made on the issue whether or not grounds exist for the appointment of a conservator or receiver. Any question as to the correctness of the Board's opinion, at the time when it summarily appointed a Supervisory Representative in Charge, that ground for the appointment of a conservator or receiver existed and that an emergency existed which required immediate action, is merged in the issue before the court on review of the administrative action. *Fahey* v. *Mallonee* (1947), 332 U. S. 245, 253-254, 67 S. C. 1552, 91 L. Ed. 2030; *Beacon Federal S. & L. Ass'n* v. *Federal Home Loan Bank Board* (D. C. E. D. Wis., 1956), 143 F. Supp. 534, 535-536.

Beacon's attack upon the Board's action on the ground of alleged lack of emergency; particularly in that Beacon was solvent when the Supervisory Representative in Charge was appointed, is also poorly taken for the reasons just stated. In addition, neither the statute nor common

sense makes insolvency a prerequisite to action under 1464(d)(2). "It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency." *Daniels* v. *United States* (C. A. 7, 1957), 242 F. 2d 39, 42. Section 1464(d)(2) specifies four grounds for the appointment of a conservator or receiver, and hence of a Supervisory Representative in Charge: Insolvency, violation of law or regulation, concealment of books, and unsafe or unsound operation. Insolvency is but one of four grounds, and under the statute, the Board need only be of the opinion that "*a* ground" exists. (Emphasis supplied.)

Order No. 9414 (Ex. 169 at R. 1059), dated March 20, 1956, appointing a Supervisory Representative in Charge, was not certified to have been adopted by the Board. Beacon contends that the lack of certification constitutes a fatal defect in that action and in all subsequent acts and proceedings of the Board because of the requirements of 24 C. F. R. § 147.2, Rules and Regulations of the Savings and Loan System:

> "* * * The formal resolution of the Board so appointing any such Supervisory Representative in Charge shall state the ground or grounds which, in the opinion of the Board, exist for the appointment of a conservator or receiver and the reason or reasons which the Board determines exist requiring such immediate action. The Secretary to the Board shall mail a *certified copy* of such resolution to the address of the association as it shall appear on the records of the Board and to each director of the association known by the Secretary to be such, * * *." (Emphasis supplied.)

The authority cited by Beacon is inaccurately cited. Section 147.2 in the form relied upon by Beacon did not become effective until June 26, 1956, three months after order or resolution No. 9414 was issued; see 21 Federal Register 4548. Before June 26, 1956 there was no regulation specifically covering the procedure upon appointment of a

Supervisory Representative in Charge. Desirable as certification may be as an assurance that official action has been taken, it cannot be said that the Board failed to follow subsequently self-imposed procedure. The subsequent actions of the Board leave no doubt as to the authenticity of Order No. 9414.

There exists a dispute between the parties as to the nature of this court review. Beacon's claim is that the court has the jurisdiction and obligation to evaluate the evidence and pass on the question *de novo*. This claim is not supported by the statutory and case authority. Section 1464(d)(2) provides:

> "* * * Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to *review* as therein provided and the review by the court shall be upon the weight of the evidence. * * *" (Emphasis supplied.)

The method of approach and standard applicable to a review on "the weight of the evidence" have been explained by the Court of Appeals for the Seventh Circuit in two cases dealing with section 6b of the Commodity Exchange Act, 7 U. S. C. A. § 9, which also provides for review on the weight of the evidence. In 1948 the Court stated, *General Foods Corporation* v. *Brannan* (C. A. 7, 1948), 170 F. 2d 220, 223-224:

> "Thus the standard to be employed is something other than the 'substantial evidence rule' controlling in the review of other administrative orders. In *Nichols & Co.* v. *Secretary of Agriculture*, 1 Cir., 131 F. 2d 651, the only case called to our attention in which the provision has been discussed, the court indicated that a reviewing court was authorized to consider the evidence *de novo*. Whatever the requirement be labeled, we think it means that petitioners are entitled to have the order vacated unless this court concludes that it is sustained by the weight of the evidence, and to us that means the preponderance or greater weight."

In *Great Western Food Distributors, Inc. v. Brannan* (C. A. 7, 1953), 201 F. 2d 476, 479-480, the Court of Appeals enlarged upon its analysis:

> "However, while this court must examine the sufficiency of the evidence, and this may entail a careful consideration of the proof, see *Nichols & Co. v. Secretary of Agriculture*, 1 Cir., 131 F. 2d 651, we should be mindful of the practical difficulties and pitfalls presented in attempting to redetermine, from an inanimate record alone, issues such as these here presented. Often the 'most telling part' of the evidence is not apparent from the printed page, 'for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors'. *N. L. R. B. v. Universal Camera Corp.*, 2 Cir., 190 F. 2d 429, 430. Thus, 'we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth.' *Ohio Associated Tel. Co. v. N. L. R. B.*, 6 Cir., 192 F. 2d 664, 668. * * *
>
> "It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of the fact was justified, *i. e.* acted reasonably in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further is to disregard the 'most telling part' of the evidence. *N. L. R. B. v. Universal Camera Corp., supra.* * * *"

Thus, this review under 12 U. S. C. A. 1464(d)(2) is on the weight of the evidence, by which is meant the preponderance or greater weight, something other than substantial evidence. The court must review the record to determine whether or not the findings are supported by the weight of the evidence, for if they are not, they cannot stand. But Congress did not intend the proceeding before

the court to be a trial *de novo* on a written record. It is a review, and accordingly proper weight must be given to the opportunity of the finder of fact to observe the witnesses and evaluate their credibility. Therefore, when reviewing on the weight of the evidence, the standard to be used in order to avoid a determination based solely on the dry and lifeless, and therefore imperfect record, and instead to give effect to the superior opportunities of the finder of fact, is: Could a man reasonably conclude from the evidence in the record, but as perfected or filled out by an opportunity to observe the demeanor of the witnesses and draw reasonable inferences therefrom, that the weight of the entire evidence supported the findings now before the court?

The general rule is that courts reviewing the findings and conclusions of administrative agencies will give weight on doubtful questions to their informed judgment as experts in their fields. See *Moog Industries, Inc.* v. *F. T. C.* (1958), 355 U. S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370; *Universal Camera Corp.* v. *N. L. R. B.* (1951), 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456; *Federal Security Administrator* v. *Quaker Oats Co.* (1943), 318 U. S. 218, 63 S. Ct. 589, 87 L. Ed. 724; *United States* v. *Neally* (C. A. 7, 1953), 202 F. 2d 289. This rule applies as well to reviews on the weight of the evidence as to reviews on substantial evidence or other standards. It refers not to the standard of proof or evidence but to that competence or expertise in its area which is legally presumed to reside in every duly constituted administrative agency. In this case the rule is applicable, particularly to the weight to be given the Federal Home Loan Bank Board's determination that certain conduct or actions, assuming them to be proved by the weight of the evidence, constitute a violation of law and regulations or constitute unsafe or unsound operations for a Federal savings and loan association.

Under section 1464(d)(2) the final remedy provided to correct unlawful activities of a Federal association is appointment of a conservator or receiver. Whether the Board will make use of this remedy, assuming that a violation has been proved, is a question reserved by the statute to the discretion of the Board. The Board's determination to appoint a conservator or receiver on the basis of the violations proved is, however, subject to review by the court according to the following standard, set down in *Daniels* v. *United States*, *supra* (p. 42):

> "* * * The Administrative decision as to the remedy should be sustained unless the remedy selected has no reasonable relation to the practice found to exist. * * *"

In this case the Board had 172 exhibits and much testimony. To review in detail this record would unduly extend this opinion. The following are part of the facts which the Board had before it in reaching its determination. All dates are the year 1955 unless otherwise indicated.

About the summer of 1954, Beacon's directors were considering acquiring new offices. Sydney Eisenberg, a Milwaukee attorney, was, for practical purposes, owner of the Laneil Realty Corporation, hereinafter called Laneil. Eisenberg negotiated with parties herein called collectively the Sweds for the purchase of properties owned by the Sweds at Second and Wells, hereinafter referred to as Second, and at Fourth and Wells, hereinafter referred to as Fourth. Arrangements were made for the purchase by Laneil of Fourth for $200,000 and Second for $500,000, less 5% in lieu of brokerage fee, or $190,000 and $475,000 net respectively. Eisenberg offered Second to Beacon for $500,000. Henry Blume, an attorney, was president and a director of Beacon, and Ernst Zaeske, vice-president, secretary and a director of Beacon. Blume and Zaeske telephoned Beacon's other directors and obtained an informal approval of the purchase of Second for $500,000, subject

to appraisal and the executive committee's approval. Laneil had a purchase agreement from the Sweds on Second for $475,000. It applied for a mortgage loan of $480,000. Laneil assigned its purchase contract on Second to Beacon. No mortgage or note was ever executed. Blume, Zaeske, and a Beacon director named Meyer, appraised Second at $700,000 on January 13, the date that Laneil had executed the contract to buy it from the Sweds for $475,000. The existence of this contract was known to Blume at the time. Beacon's executive committee informally approved the purchase of Second.

Laneil also executed a purchase agreement for Fourth for $190,000. This agreement called for $19,000, earnest money, and the balance of $171,000 by March 31. Laneil applied to Beacon for a mortgage loan of $150,000 on Fourth and executed a mortgage note for that amount in connection with the application. Blume, Zaeske, Meyer, and Slocombe, another director of Beacon, appraised Fourth at $250,000, Blume having knowledge of the contract purchase price.

Laneil quit-claimed property at 770 N. Marshall to Beacon as collateral security on both Fourth and Second. This property was subject to a first mortgage held by the Bankers' Life Insurance Company. Laneil also gave Beacon a quit claim to the property at 803-813 E. Wells Street as collateral security on Fourth. At that time Beacon held the first mortgage on this property in the sum of $242,103.40. The additional permissible loan amount under the regulations was $11,229.23. There was also surrendered as collateral on both the Fourth and Second loan, life insurance with cash surrender value of about $2,500.00.

On January 14, Laneil delivered an option to Beacon to buy Second for $500,000 on or before March 30, "in consideration of making of a loan of $480,000." Beacon's directors informally approved such loan on Second. A Beacon

check for $47,500, signed by Blume, was released to the Sweds in payment of earnest money on Second. A mortgage loan account in the name of Laneil was set up on Beacon's books in the amount of $480,000, and a corresponding loan-in-process account for the same amount. The $47,500 Beacon check released to the Sweds was entered as a disbursement from the loan-in-process account, after which it showed a balance of $432,500.

Laneil and another Eisenberg corporation, Knapp Street Realty, assigned three Beacon savings accounts to Beacon as collateral on Fourth and Second, one of which was subject to a prior assignment to the Bank of Commerce to secure an $8000 loan. A mortgage loan account and a corresponding loan-in-process account in the name of Laneil were set up on Beacon's books for $200,000 on Fourth.

A Beacon check for $19,000 was delivered to the Sweds as earnest money payment on Fourth.

Beacon's executive committee approved the $480,000 loan to Laneil on Second on January 18 with the notation, "Hold $200,000 for improvements or $280,000 without improvements." There was no indication as to the character of the improvements or their value. It also approved a $200,000 loan to Laneil on Fourth with the notation, "Hold $50,000 for improvements or $150,000 loan without improvements," also without indication as to the improvements. On January 19 the board of directors took similar action. The board of directors also directed the management to entertain offers for the purchase of Beacon's office, 769 North Water Street.

February 2, Beacon's executive committee authorized the purchase of Second for $500,000, $475,000 to the Sweds and $25,000 to Laneil.

February 4, the Downtown Development Corporation, hereinafter called Downtown, recorded its Articles of Incorporation. The capital stock was 800 shares no par com-

mon, each to be sold for $10. The original subscribers were Eisenberg—300 shares, Blume—100 shares, Zaeske—100 shares, and 300 shares to other people.

February 7, a $20,000 check was given by Beacon to Laneil in connection with Second. It was immediately endorsed by Eisenberg and turned over to Downtown as a loan. On February 7 the Sweds gave Beacon a warranty deed to Second. On that day Beacon allowed Knapp Street Realty to withdraw $1,000 from a savings account which had been assigned to it as collateral. This withdrawal reduced the balance of account No. 6130 to $4665.72. This withdrawal was by check made payable to Downtown. On February 8, Beacon gave another check, this one for $5,000, to Laneil in connection with Second.

February 14, the Articles of Incorporation of the Atomic Security Corporation, hereinafter called Atomic, were filed. They provided for 800 shares of capital stock at $10 per share.

February 15, Romecus Real Estate sent Blume a letter offering to do the managing and leasing of "your new building" at Second for a fee of $1,000 per month, plus expenses.

February 16, Beacon's directors approved the executive committee's minutes authorizing the purchase of Second for $500,000. Beacon's board also resolved to lease the property to Atomic for 99 years, requiring Atomic to erect a building for $3,000,000 with Beacon taking a lease back on the first and second floors, and to petition the Home Loan Bank Board for approval of this plan. It readvanced $7000 to Laneil on 803-813 E. Wells. The previous monthly payments on the old mortgage were not increased. The money was issued in two checks, one for $5,000 which was immediately endorsed over to Atomic, and the other for $2,000 which was endorsed to Downtown.

February 17, Trans-America Enterprises Incorporated, hereinafter referred to as Trans-America, filed its Articles of Incorporation.

March 8, the Board approved the purchase of Second based upon the assumption that the purchase and rental were contemplated solely for the purpose of acquiring office quarters and not for the purpose of investment.

March 16, Beacon sold its office building to Trans-America on land contract for $100,000 with a down payment of $10,000 and the balance in monthly payments of $650, including interest at 6%. It took a lease back for three years at $1,000 a month, it to have the privilege of cancelling the lease. Beacon immediately treated the unrealized profit on this sale as profit and credited it to the Federal Insurance Reserve Account.

March 17, Downtown's directors resolved to purchase Fourth for $225,000.

March 31, Beacon paid Remeeus Real Estate $1,000 for leasing services relative to the proposed building on Second.

April 4, Downtown paid Beacon $42,423.13 on behalf of Lanell, showing the payment to be an investment in Fourth, and Beacon's check for $131,000, representing the remainder of Beacon's $150,000 loan on Fourth, was delivered to the Sweds together with the money advanced by Downtown. The Sweds gave Lanell a warranty deed to Fourth.

April 20, Beacon's directors employed Downtown, effective April 1, as leasing agent for the building to be built on Second at $2,000 per month plus expenses. At that time Blume still had in his possession the February 15th letter from Remeeus offering to perform those services for $1,000 a month plus expenses. Under this resolution Beacon paid Downtown $6,000 on this contract.

April 29, Laneil conveyed Fourth to Downtown for $225,000.

May 18, Beacon's board, varying the February 16 resolution concerning Second, resolved to sell Second to "a 'X' Corporation" for $850,000, subject to certain terms, among them being $50,000 as the maximum to be spent by Beacon for surveys, etc., the "X Corporation" to agree to construct an office building to be approved by Beacon, Beacon to have a thirty-year lease in the first four floors at certain rates, Beacon to have an option to purchase if it paid advance rental up to ten years.

May 23, the owners of a plot 150 feet by 298.36 feet at Sixth and Wisconsin, hereinafter referred to as Sixth, executed an option for its purchase for $1,000,000 and agreed to pay the optionee 5%, commission on the sales price. This option was assigned to Downtown, reserving one-half of the commission.

May 27, the owners of Sixth executed a buy-and-sell agreement with Downtown for $1,000,000, receiving $5,000 as earnest money and crediting $50,000 as against the real estate commission. The owners, A. J. Harvey, of the option received from Downtown $5,000 in cash and at a later date, $20,000 in Downtown stock. The other half of the commission went to the order of Blume-Zaeske and was eventually paid to Atomic on June 7.

May 31, Beacon sold Second to Atomic on land contract at a price of $850,000. The down payment made on this contract was $5,000. At this time, $39,356.82 of the $50,000, authorized for survey work on Second, was unspent. However, the land contract between Beacon and Atomic contained no reference to crediting the unspent remainder to Atomic. It contained no reference to any leasing of space in the proposed building by Beacon. Downtown and Atomic approved an agreement between them whereby Downtown

became Atomic's exclusive agent for leasing, managing, and financing all property of Atomic. This agreement was executed in writing on June 30. Also on May 31, Downtown resolved to sell its interest in Sixth to Atomic at a profit of $125,000.

June 3, Beacon's executive committee, Blume, Zaeske, Meyer, and Slocombe, authorized Eisenberg to act as Beacon's agent to purchase or secure a long-term lease to a part of the property at Sixth and gave him a Beacon check for $125,000 to be used as the down payment. On the same day, Downtown received $125,000 from Eisenberg as a "deposit on real estate".

On June 6, Downtown made a $45,000 payment on Sixth, and received a land contract covering that property.

June 9, Beacon credited to Atomic's escrow account $39,356.82, being the unused balance of $50,000 authorized to be expended for surveys and other preliminary work on Second. This reduced Beacon's paper profit on Second to $300,000.

June 15, Beacon's directors passed a resolution designating Atomic as the "X Corporation" referred to in the minutes of May 18. It set forth that Atomic had purchased Sixth and was willing to build a building which would house Beacon's offices, resolved that Beacon enter into a lease for 20 years on portions of the building, setting forth the rental per square foot, and "That the Association deposit $300,000 for future rent for which it is to receive a credit in a manner to be determined upon execution of a lease, the terms of which to be mutually agreed upon", Beacon also to be given an option to renew the lease.

June 16, Beacon transferred $175,000 to Atomic's escrow account. This, plus the $125,000 given to Eisenberg, aggregated $300,000. At this time there was no construction contract in existence for the erection of the building on

Sixth, there was no performance bond, and at that time Atomic was capitalized for $8,000. On this date, Blume paid $100,000 out of Atomic's escrow account to Downtown. It was recorded as "Deposit on 6th and Wis."

June 29, Blume issued a Beacon check for $35,000 in favor of Downtown against Atomic's escrow account. There was an entry describing this as 3500 shares common stock of Downtown, and Downtown issued its certificate for 3500 shares of stock to Atomic. The certificate of amendment increasing Downtown's capitalization had been filed, pursuant to the Wisconsin Statutes with the Register of Deeds about June 22. Atomic deposited its certificate of Downtown's stock with Beacon as collateral security for the purchase of Second.

July 5, Atomic assigned the land contract on Sixth to Beacon as collateral security for Beacon's deposit of $300,000.

July 29, Downtown paid Beacon the balance owing on the Fourth mortgage of $143,815.96. Beacon returned the pledged security.

August 1, $75,000 was paid by Beacon's check from the Atomic escrow account on the land contract of Sixth. Thus, on this date Beacon had completely disbursed the $300,000. Its only security was an assignment of the land contract.

August 18, Atomic and Beacon executed a lease-option agreement relating to part of the property at Sixth, 90 feet by 110 feet. Under this agreement, Atomic agreed to erect an office building costing not less than $1,500,000, plans to be approved by Beacon. Beacon was to lease, for twenty years, parts of the first three floors at an annual rental of $94,660, rent payable one year in advance. The $300,000 previously paid by Beacon was designated payment for an option to purchase the premises for an additional million dollars, subject to adjustment with reference to costs of

building. The appraisals of the real estate upon which the building was to be built ranged from $345,000 to $[illegible]000.

October 5, Horace Russell, a director of Beacon and one of its legal advisers, requested the opinion of the Board on a proposed renewal lease and option agreement to be executed between Beacon and Atomic with reference to Sixth. Under this agreement Beacon would advance an additional $300,000 to Atomic in return for alleged additional advantages, the most important of which was that the total of $600,000 which Beacon would have paid out could be applied against rent payments after the first twenty years of the lease. Under this proposed renewal lease and option agreement, Beacon was also to have an option to purchase the building.

By October 5 construction had begun at Sixth. On October 18, the defendant requested that Beacon refrain from any further commitment of its assets in connection with transactions involving Downtown or Atomic. On October 19, Beacon's board of directors resolved to execute the renewal lease and option agreement "upon the advice of the Federal Home Loan Bank Board that there is no objection". At about this time construction of the building at Sixth was stopped.

December 21, Beacon's board of directors transferred out of the Federal Insurance Reserve Account to a Special Reserve For Unearned Income Account both the unrealized profit from the sale of its offices at North Water Street and $295,000 unrealized profit from its sale of Second to Atomic.

December 31, Downtown's records showed that it paid dividends, of which Blume received $1,800, his wife, $500 and Zaeske, $1,300.

The record shows that during 1955 Blume acquired from retained discounts on title examinations, abstract extensions and title policies the sum of $8,475.42. The record

further shows that Atomic had made no payments on its land contract with Beacon since March 14, 1956.

March 15, 1956, Beacon received a copy of the report of the supervisory examination by the defendant.

March 20, 1956, defendant issued an order appointing a Supervisory Representative in Charge of Beacon.

August 13, 1956, an administrative hearing of the Board was commenced to determine whether grounds existed for the appointment of a conservator over Beacon.

May 20, 1957, the Board issued the order adopting the recommended decision of the hearing examiner making additional findings and conclusions and appointing a conservator over Beacon.

On the question of the intent of the parties at the time of these transactions, the board had before it letters of Blume, portions of which are quoted below. The court wishes to make clear that this opinion is not to be construed as casting any doubt or intimation of wrong-doing on Mr. Zeckendorf or the firm of Webb & Knapp. No charges were made against them and no findings were made against them. There is no evidence in the record to indicate any wrong-doing on their part.

Letter of April 15, 1955 from Blume as President of Beacon to Elliot H. Binzen, Vice-President of Webb & Knapp, New York:

> "Enclosed please find preliminary figures of the Beacon Federal Savings Building; also the plan of operation.
>
> "You will note that this plan involves no cash on the part of either Webb & Knapp or our group here. The legal part is as follows: We have formed the Atomic Security Corporation, capitalized with 800 shares at $10.00 per share. Four of our group have paid $8,000.00. Three individuals $1,000.00 each, and the fourth, $5,000.00. The fourth man will sell 400 shares for $4,000.00 to Webb & Knapp. This therefore makes

you 50% with the four Milwaukeeans. The Atomic Security Corporation secures the 99 year lease and agrees to erect the building. The ground rent is to be subordinated in accordance with this agreement.

"I would like your opinion on this plan, and any suggestions you may have to offer: also copy of a proposed letter of intent for tenants to sign. And I think you might set up in your own words what our deal is. As I understand it, we are to secure the first 50% of the national lease tenants. You are to secure the remaining 50%, although our leasing agent, Remeeus, will assist. In the event there should be any expense involved, Webb & Knapp and the Milwaukee group go 50-50, although it is not my intention that anybody puts up any money other than the total of $8,000.00, which is the capitalization of the Atomic Security Corporation."

Letter of April 29, 1955 from Blume as President of Downtown to William Zeckendorf, President of Webb & Knapp:

"The U family, largest owners of downtown Milwaukee property, have had conferences with me for the past two days, and there is a distinct possibility that they will offer me an option for six months on very desirable downtown properties.* On one of these pieces of property I think we have a possible tenant in Montgomery Ward, * * *.

"I am also mailing* copy of lease to be executed between Beacon Federal and Atomic Security. Elliot Binzen* has the details of Atomic Security Corporation. This intermediate corporation is necessary because the Federal Home Loan Bank does not want me to sign on both sides of the lease. This corporation has 800 shares. If desired, Webb and Knapp may have 400 shares. The investment is nominal, to wit: $10.00 per share. The company stock is fully paid in and we have the $8,000.00 in the bank.

"The Atomic Security Corporation will give a build-

* The original letter shows a correction. We have quoted the original as corrected.

ing contract to the Downtown Development Corporation, and we should make from 2% to 5% on the construction, plus some other profits which you no doubt know about. It is my suggestion that when the building is erected, the Atomic Security assign their 99 year lease to the Downtown Development Corporation and dissolve. The Downtown Development Corporation has a leasing contract with the Beacon whereby the Beacon pays Downtown Development Corporation $2,000.00 a month plus expenses for advertising, etc. The Downtown Development Corporation employs the Remeeus Company for $1,000.00 per month to do the work; so there is a net profit of $1,000,00 a month.

"I am also mailing* a breakdown of the Beacon Federal Building. It would appear to me that there will be a profit of approximately $200,000.00 a year to be divided, and we may be able to do better. It will be ten years before the Beacon's reserve will be sufficient for us to purchase our own building."

Letter of July 1, 1955 from Blume as President of Downtown to Art Rubloff, associated in some manner with Webb & Knapp:

"The land at N. 2nd and Wells and the land at N. 6th and Wisconsin is owned by the Atomic Security Corp. However they have drawn a contract with the Downtown Development Corp. which provides that the Downtown Development Corp. shall do the leasing, management, financing, etc., and a copy of this contract is also attached. The Downtown Development Corp. will apply to the State Securities Commission for registration of its stock, to wit: 120,000 shares, and for a $2,000,000.00 5% Debenture issue. The proceeds of the Debenture issue is to be used to buy the furnishings for the Sheraton Hotel. The Sheraton pays 7% of the cost of the furnishings for 25 years, which is sufficient to net a return of approximately 4½% and also amortize the principal investment.

"It is my opinion that if Bill, you, and I buy the

* The original shows a correction. We have quoted the original as corrected.

land for $1,150,000.00, which is the resolution of the Atomic Security Corp. that it will sell the land for that amount, that this becomes a good investment since the land is purchased on land contract, of which $225,000.00 has been paid and $900,000.00 is still due, payable $100,000.00 a year, next payment being due May 27, 1956, a $100,000.00 payment being due May 27, 1957, and $700,000.00 being due May 27, 1958; interest at the rate of 4½%, and interest waived from start of construction.

"It is my belief that this fee 'land', with the building on it, and a lease from Sheraton and Beacon is worth better than $2,000,000.00, and we should be able to sell that land or the interest in the land for better than $2,000,000.00, and to make a very substantial return with little investment."

Letter of October 14, 1955 from Blume as President of both Beacon and Downtown to Design, Incorporated of St. Louis:

"On motion duly made, seconded and unanimously carried, it was resolved that the Association make the construction loan on the Beacon Federal Savings Building at 60% of appraised value.

"I mailed you previously a photostat copy of Horace Russell's opinion that we are so authorized. We can now loan a million three. However, I am timing the date of the construction loan to be December 1st when we will be able to make a million four. There has been previously paid by the Beacon on an option, $300,000.00.

"I am enclosing herewith a Renewal Lease and Option Agreement under the terms of which the Beacon will pay another $300,000.00. This therefore makes a total of two million dollars which the Beacon puts into the project; $600,000.00 on the option, and $1,400,000.00 on the construction loan; in addition thereto, on December 19th the Beacon will pay $95,000.00 one year's advance rent. If you are successful on December 1st you will pay the Atomic Security Corp. $750,000.00 as the purchase price of Parcel 2. In January the City will pay upwards of $300,000.00 for the 40 feet they are taking for street widening. This makes a total of

$3,145,000.00, to which may be added a second mortgage to be taken by the Bank Building & Equipment Corp. of $300,000.00 if necessary, bringing the total receipts to $3,445,000.00.

"According to present plans, we expect to pay you for architect's fees and general contract, approximately $1,800,000.00. We will be paying one million for the land. This makes a total of $2,800,000.00 and would leave if necessary, about $645,000.00 to take care of leasing and financing fees which should not exceed $150,000.00, and the rest can spill over into 2nd and Wells so that we will have a substantial equity therefor financing."

The Board found that Beacon entered into unsafe and unsound operations by entering into a series of interrelated transactions involving properties at Second, Fourth and Sixth; that these transactions were unsafe and unsound, were designed to finance and give credit standing to large-scale speculative ventures of Blume, Zaeske and associates and corporations in which they and their associates had an interest; that they were designed to divert Beacon's assets to their personal gain and profit. The court is of the opinion that this finding is in accord with the weight of the evidence.

The court also is of the opinion that the finding that Downtown made $125,000 profit on Sixth as a result of unsafe and unsound operations by Beacon is sustained. This profit inured to the benefit of Blume, Zaeske and their associates through Downtown.

The court is of the opinion that the finding that Beacon engaged in unsafe financing and leasing arrangements with reference to Sixth is sustained.

The finding with reference to the $25,000 commission money ultimately paid to Atomic on the sale of Sixth to Downtown is sustained in the opinion of the court, as is the finding that Beacon paid an excess of $25,000 for Second.

These are both part of the scheme. Some of the individual matters, if they stood alone might be defended as at most being poor judgment, but where they fit into an entire scheme or operation, they take a different light and become indefensible.

With reference to the $39,356.82 credited to Atomic's escrow account by Beacon on June 9, the findings are sustained that Beacon was under no legal obligation to Atomic to make any such payment or to give it credit for any of the unexpended part of the $50,000 that Beacon's Board had authorized for surveys.

With reference to the $2,000 a month leasing fee to be paid by Beacon to Downtown with reference to Second, the record is clear that Blume had Remceus' offer to perform these services at $1,000 a month. This was not shown to the directors when they engaged Downtown to do it for $2,000 a month. Plaintiff claims that Remceus was sick and could not do the work. Nevertheless, Downtown engaged him for $1,000 a month on his offer to do it for that. There was not a full disclosure to the directors of Beacon and its records do not disclose that they had knowledge of such arrangement. The court is of the opinion that that finding is sustained.

The court is of the opinion that the findings with reference to the May 18th resolution of Beacon's directors are sustained. The fact that the resolution referred to an "X Corporation" instead of designating it, indicates another part of the scheme and concealment. Without even knowing the identity of the purchaser, the directors of Beacon authorized the payment of ten years' rent in advance. At that time there were no plans, specifications or financing arrangements.

Regarding the sale of the property at 769 North Water Street to Trans-America, this apparently was part of the scheme. The court cannot say that the Board decided

against the weight of the evidence in holding that Trans-America had not shown enough financial responsibility to justify conveying the property to it even by land contract on such a small down payment.

The finding with reference to the resolution of the board of directors of Beacon of February 16 is, in the opinion of the court, sustained. That resolution indicates that the Association was going to buy, when it had already purchased, Second. It was certainly inaccurate, to say the least, and misleading, if not part of an attempt to conceal.

Similar observations should be made with reference to the finding of the Board concerning Beacon's resolution of June 15.

The findings of improper book entries with reference to the unrealized profit of $55,225 from the sale of 769 North Water Street and $295,000 from the sale of Second are sustained.

The finding that Beacon's books were kept in such a manner as to falsely reflect its financial condition because of the recording of Beacon's loan on Fourth for $50,000 more than the amount of the mortgage note is sustained.

The finding that Beacon either kept its books in such manner as to falsely reflect its financial condition by recording the loan on Second for $200,000 more than the amount actually granted, or in the alternative, that Beacon granted a loan on Second in excess of the maximum permitted percentage of value is sustained.

The finding that Beacon kept its books in such manner as to falsely reflect its financial condition by giving a fictitious asset value to the $300,000 credited by Beacon to Atomic's escrow account is sustained by the weight of the evidence. By the time Beacon completed its disbursement of this $300,000 to Atomic's credit on June 16, there was in existence no lease between Beacon and Atomic, no final plans and specifications with reference to the proposed

building on Sixth, no performance bond for the erection of the building and no binding arrangements for underwriting the $2,000,000 of proposed debentures which Downtown would use on the project at Sixth.

The analysis of the financial accounts of Downtown made by the Board sustain its finding that Downtown acquired Fourth at a cost of less than $60,000 to itself, and more than $130,000 to Beacon with the possible exception of items not having an effect of more than $4,000. The basic finding is sustained with the possible exception of a comparatively small amount of money.

The record sustains the Board's finding that on April 12, 1956, Blume and Zaeske made false representations to the Board with reference to the owning of Downtown. It might be that it was the intention at that time to increase the capital stock of Downtown but that was not the representation made to the Board.

The court is of the opinion that the findings with reference to the unsecured loans of $19,000 on Fourth and the $47,500 on Second are sustained.

A closer question is presented with reference to the finding that loans were made for an excessive term on 803-813 East Wells Street. This is a minor matter considering the picture as a whole. It is a matter which is peculiarly within the knowledge of the Board as to how these things should be handled, and the court cannot say that the finding is not sustained by the evidence.

The finding of the Board that Beacon violated regulations by granting readvances totaling $7,000 on 803-813 East Wells Street because this action had the effect of increasing a loan on these properties above the maximum permitted percentage of value is not sustained by the weight of the evidence. However, it is clear that the transaction involved an unlawful release of security by Beacon and to that extent

was a violation of the regulations. The finding of the Board in that respect is sustained by the weight of the evidence.

Blume's retention of discounts on abstract continuations and title policy examinations was certainly violative of the spirit of the regulations. The Board found that they violated the letter of the regulations. Considering that this is a field in which the Board is expert, the court feels that it cannot set aside that finding.

The Board's finding that Beacon had a management which was unsafe or unfit to manage a Federal savings and loan association is clearly supported by the weight of the evidence as is evidenced by the series of unlawful and unsound transactions upon which Beacon's board permitted the Association to enter.

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. Defendant is to prepare an order in conformity with this opinion, submitting it to plaintiff's counsel for approval as to form only.

Dated, Milwaukee, Wisconsin, this 28th day of May, 1958.

/s/ K. P. Grubb,
United States District Judge.

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Wisconsin.

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION, *Plaintiff*, vs. FEDERAL HOME LOAN BANK BOARD, *Defendant*.	Civil Action No. 57-C-121.

ORDER FOR JUDGMENT.

This cause came on to be heard on motion of the defendant Federal Home Loan Bank Board for summary judgment and on cross-motion of the plaintiff, Beacon Federal Savings and Loan Association for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the entire record in the cause and having heard the argument of counsel and considered the briefs filed herein, and due deliberation having been had thereon, and the Court, on the 28th day of May, 1958, having filed its opinion in this cause directing that an order for judgment be entered dismissing the action on its merits, it is

ORDERED, pursuant to said opinion, that plaintiff's cross-motion for summary judgment be and the same is hereby denied, and it is further

ORDERED, that defendant's motion for summary judgment dismissing the within action on its merits be and the same hereby is granted and that judgment be entered accordingly together with such costs as the defendant may be entitled to receive of the plaintiff.

Dated this 4th day of June, 1958.

ENTERED:

s/ K. P. GRUBB,
District Judge.

Approved as to form:

s/ RICHARD A. MCDERMOTT,
Counsel for Plaintiff.

APPENDIX E.

UNITED STATES DISTRICT COURT,

Eastern District of Wisconsin.

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION,
Plaintiff,
vs.
FEDERAL HOME LOAN BANK BOARD,
Defendant.
No. 57-C-121.

OPINION.

Petition by plaintiff for an order directing reimbursement of plaintiff association for expenses and disbursements incurred on its behalf in connection with the seizure of the plaintiff, appointment of a Supervisory Representative in Charge, administrative hearings before the defendant subsequent to the seizure, culminating in the appointment of a Conservator, and in connection with this action brought to review the findings and order of the defendant.

The decision of this court on the merits sets forth the factual background. 162 F. Supp. 350.

The court is not convinced that it has power to grant the prayer of the petition. However, even if the court has that power, it does not feel that this is a proper case for the

court to exercise it. There is no fund being administered by the court, and the services of the attorneys did not enhance the funds of the association or preserve or protect such funds. It is only in an exceptional case where attorney fees should be ordered by the court to the unsuccessful litigant.

The court does not find that this action was brought by the plaintiff in bad faith. Plaintiff had a right to have the action of the defendant reviewed by the court.

Plaintiff's petition is hereby denied without prejudice to the right of the plaintiff or the attorneys in question to make such a claim and take such action as they believe they are entitled to against anyone that they believe indebted to them on account of attorney fees and disbursements.

Dated, Milwaukee, Wisconsin, this 28th day of August, 1958.

s/ K. P. Grubb,
U. S. District Judge.

APPENDIX F.

UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION, *Plaintiff*, vs. FEDERAL HOME LOAN BANK BOARD, *Defendant*.	Civil Action No. 57-C-121.

JUDGMENT.

The Court having heretofore, on the 9th day of June, 1958, entered its order in accordance with the opinion filed on the 28th day of May, 1958, directing that judgment be entered in favor of the defendant.

Now on motion of the attorneys for the defendant,

IT IS ADJUDGED AND DECREED that the complaint herein be dismissed upon its merits.

Dated this 3rd day of September, 1958.

Entered:

s/ DALE E. IHLENFELDT,
Clerk, United States District Court.

APPENDIX G.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 12475 SEPTEMBER TERM, 1958 APRIL SESSION, 1959.

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION,
Plaintiff-Appellant,
vs.
FEDERAL HOME LOAN BANK BOARD,
Defendant-Appellee.

Appeal from the District Court of the United States, for the Eastern District of Wisconsin.

May 6, 1959

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* This action was brought by Beacon Federal Savings and Loan Association, herein called Beacon, to review orders of Federal Home Loan Bank Board, herein called the Board, appointing a supervisory agent for Beacon and to test the constitutionality of those orders. Beacon based its action on certain provisions of the Home Owners' Loan Act of 1933 as amended (12 U. S. C. A. 1464 (d) (2)) and § 10 of the Administrative Procedure Act (5 U. S. C. A. 1009). Each party made

a motion for summary judgment. That of Beacon was denied; that of the Board was granted.[1]

On June 9, 1958, the court signed its "Order for Judgment", which was entered in the civil docket on the same day. The Order for Judgment provided:

> "* * * the Court, on the 28th day of May, 1958, having filed its opinion in this cause directing that an order for judgment be entered dismissing the action on its merits, it is
>
> "Ordered, pursuant to said opinion, that plaintiff's cross-motion for summary judgment be and the same is hereby denied, and it is further
>
> "Ordered, that defendant's motion for summary judgment dismissing the within action on its merits be and the same hereby is granted and that judgment be entered accordingly together with such costs as the defendant may be entitled to receive of the plaintiff."

On July 10, 1958, Beacon filed in the district court a motion, supported by petition, for the allowance of attorneys' fees and disbursements as prayed for in said petition. On August 28, 1958, that court filed its opinion saying inter alia:

> "The court is not convinced that it has power to grant the prayer of the petition. However, even if the court has that power, it does not feel that this is a proper case for the court to exercise it. There is no fund being administered by the court, and the services of the attorneys did not enhance the funds of the association or preserve or protect such funds. It is only in an exceptional case where attorney fees should be ordered by the court to the unsuccessful litigant.
>
> * * * * * *
>
> "Plaintiff's petition is hereby denied without prejudice to the right of the plaintiff or the attorneys n

1. The district court's opinion appears at 162 F. Supp. 350.

question to make such a claim and take such action as they believe they are entitled to against anyone that they believe indebted to them on account of attorney fees and disbursements."

On September 3, 1958, the clerk of the court entered an order, as follows:

"Judgment.

"The Court having heretofore, on the 9th day of June, 1958, entered its order in accordance with the opinion filed on the 28th day of May, 1958, directing that judgment be entered in favor of the defendant.

"Now on motion of the attorneys for the defendant,

"It Is Adjudged, And Decreed that the complaint herein be dismissed upon its merits.

"Dated this 3rd day of September, 1958.

Entered:

DALE E. THLENFELDT,
Clerk, U. S. District Court."

On September 19, 1958, Beacon filed a notice of appeal reading, as follows:

"Notice of Appeal.

"Notice is hereby given that Beacon Federal Savings and Loan Association, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 3rd day of September, 1958, and from the whole thereof, and from intermediate orders therein adverse to plaintiff, including the order herein dated and entered August 28, 1958, which denied without prejudice plaintiff's petition for an order for allowance of attorneys' fees and disbursements incurred on its behalf in connection with its seizure by the defendant, Federal Home Loan Bank Board, the appointment of a Supervisory Representative, administrative hearings before the defendant subsequent to the seizure consummating in the appoint-

ment of a Conservator, and in reference to the within action brought to review the findings and order of defendant, Federal Home Loan Bank Board.

"Dated September 4, 1958."

We have before us for disposition a motion by the Board to dismiss this appeal, "on the ground that the notice of appeal was not filed within sixty days from the date of the entry of the judgment appealed from, as more fully appears from the record herein and particularly from the Order for Judgment of the District Court, dated June 9, 1958, and the entries made in the civil docket of the District Court."

Under rule 73(a) of the Federal Rules of Civil Procedure, U. S. C. A. rule 73(a), notice of appeal was required to be filed within 60 days after the "entry of judgment". The question presented by the Board's motion to dismiss the appeal is whether the sixty-day period commenced to run on June 9, 1958, or on September 3, 1958. If June 9, 1958 is the controlling date, then the notice of appeal was not timely filed and the appeal should be dismissed.

When the language of an opinion or order embodies the essential elements of a judgment, clearly evidences the judge's intention that it shall be his final act in the case, requires the clerk to enter judgment accordingly, and the clerk makes a notation in the civil docket showing the substance of the judgment of the court, then all the elements are present to show that the opinion or order is the final judgment and time to appeal commences to run from the date of its entry. *United States v. Schaefer Brewing Co.*, 356 U. S. 227. The subsequent entry by the clerk of a formal judgment does not extend the time within which an appeal must be taken.

The order signed by the court and entered in its civil docket on June 9, 1958, embodies the essential elements of a judgment and finally disposed of the action on the

merits. After its signing by the judge and its entry in the civil docket nothing remained to be done. No order subsequently entered by the court purported to alter this fact, even if the court had authority to do so. The parties cannot by their actions extend the time within which an appeal must be taken. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453; *U. S.* v. *Ragen*, 171 F. 2d 788, and *Marley* v. *Hess*, 176 F. 2d 834. Accordingly, the proceedings subsequently commenced by Beacon to have fees allowed had no effect on the time in which an appeal was required to be taken from the order of June 9, 1958.

As to the merits of the case (exclusive of the matter of Beacon's motion for an allowance of fees and expenses), the appeal by Beacon was not timely and is dismissed, at Beacon's costs.

In view of our disposition of this appeal on the motion to dismiss we are not required to consider the case on the merits. However, we think it proper to point out that precisely the same question on the merits was determined favorably to appellant, Federal Home Loan Bank Board, by the Third Circuit on December 30, 1958 in the case of *Greater Delaware Valley Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 262 F. 2d 371. The decision in that case cites with approval the opinion of the district court in the instant case reported at 162 F. Supp. 350. If called upon to do so, we would approve this holding by the Third Circuit.

As to the appeal of Beacon from the order denying an allowance of fees and expenses, we are in accord with the reasons given by the district court for that action. No statute authorizes such an allowance. No principle of equity supports such action. The district court's action in that regard is affirmed. Costs will be taxed against Beacon.

AFFIRMED IN PART;
APPEAL IN PART DISMISSED.

APPENDIX H.

12 U. S. C. 1464(d) before the amendment of 1954.

The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

APPENDIX I.

12 U. S. C. 1464(d) as amended in 1954.

(d) (1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in

Charge, a conservator or a receiver shall be exclusively as provided in paragraph (2) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpoenas and subpoenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpoena or subpoena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in

other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Federal Home Loan Bank Board, Washington, District of Columbia.

(2) The grounds for the appointment of a conservator or receiver for a Federal saving and loan association shall be one or more of the following: (i) insolvency in that the assets of such association are less than its obligations to its creditors and others, including its members; (ii) violation of law or of a regulation; (iii) the concealment of its books, records, or assets or the refusal to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Board; and (iv) unsafe or unsound operation. The Board shall have exclusive jurisdiction to appoint a Supervisory Representative in Charge, conservator, or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint ex parte and without notice a Supervisory Representative in Charge to take charge of said association and its affairs who shall have and exercise all the powers herein provided for conservators and receivers. Unless sooner removed by the Board, such Supervisory Representative in Charge shall hold office until a conservator or receiver, appointed by the

Board after notice as herein provided, takes charge of the association and its affairs, or for six months, or until thirty days after the termination of the administrative hearing and final proceedings herein provided, or until sixty days after the final termination of any litigation affecting such temporary appointment, whichever is longest. The Board shall have the power to appoint a conservator or receiver but no such appointment of a conservator or receiver shall be made except pursuant to a formal resolution of the Board stating the grounds therefor and except notice thereof is given to said association stating the grounds therefor and until an opportunity for an administrative hearing thereon is afforded to said association. Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. A conservator shall have all the powers of the members, the directors, and officers of the Federal association and shall be authorized to operate it in its own name or conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for any Federal savings and loan association, which shall have power as receiver to buy at its own sale subject to approval by the Board. With the consent of the association expressed by a resolution of the board of directors or of its members, the Board is authorized to appoint a conservator or receiver for a Federal association without notice and without hearing. The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations and for such associations in conservatorship and receivership and for the conduct of conservatorships and receiverships. Whenever a Supervisory Representative in Charge,

conservator, or receiver, appointed by the Board pursuant to the provisions of this section, demands possession of the property, business and assets of any association, the refusal of any officer, agent, employee, or director of such association to comply with the demand shall be punishable by a fine of not more than $1,000 or by imprisonment for not more than one year or both by such fine and imprisonment.

APPENDIX J.

5 U. S. C. 1009(e).

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(e) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

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No. 175

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In the Supreme Court of the United States

OCTOBER TERM, 1953

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION,

PETITIONER,

v.

FEDERAL HOME LOAN BANK BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin on the merits (Pet. 27) is reported at 162 F. Supp. 350. The opinion of the District Court denying the petition for allowance of attorneys' fees and disbursements (Pet. 55) is reported at 165 F. Supp. 124. The opinion of the Court of Appeals (Pet. 58) is reported at 266 F. 2d 246.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1959. A timely petition for rehearing was

denied on June 2, 1959. The petition for a writ of certiorari was filed on July 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's appeal to the Court of Appeals was timely.

2. Whether the Home Owners' Loan Act of 1933 authorizes the Federal Home Loan Bank Board, upon finding that an emergency exists, to appoint *ex parte* a temporary Supervisory Representative in Charge of a federal savings and loan association.

3. Whether the Board abused its discretion in appointing a conservator for petitioner rather than employing one of the other remedies provided by the Act.

4. Whether the Board's appointment of such conservator, made in full compliance with the statutory provisions therefor, denied petitioner due process of law.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are set forth in the Appendix, *infra*, pp. 11-17.

STATEMENT

On March 20, 1956, the Federal Home Loan Bank Board, acting pursuant to Section 5(d)(2) of the Home Owners' Loan Act of 1933 (12 U.S.C. (Supp. II) 1464(d), App. *infra*, p. 13), appointed a Supervisory Representative in Charge of petitioner, a federal savings and loan association (Pet. 19-20).[1] The Board's

[1] That section provides that, "If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint *ex parte* and without notice a Supervisory Representative in Charge to take charge of said association and its affairs * * *."

order stated that, through certain business dealings, petitioner had violated the Act and the Board's regulations and conducted an unsafe and unsound operation, and that an emergency existed requiring the appointment of the Representative (*ibid.*).[2]

The Board then instituted an administrative proceeding to determine whether petitioner had violated the Act and its regulations and engaged in unsafe and unsound operations and, if so, whether a conservator should be appointed (Pet. 21, 28). After hearings at which both the Board and petitioner presented evidence, the examiner filed a recommended decision proposing that a conservator be appointed (Pet. 21-22, 28). The Board approved the recommended decision and, on May 21, 1957, appointed a conservator to take charge of petitioner (Pet. 28).

Petitioner then brought this suit against the Board in the District Court to review the appointment of the conservator (Pet. 28). Both parties moved for summary judgment (Pet. 27), and the District Court granted the Board's motion and denied that of petitioner (Pet. 52). The court sustained the Board's action in making the initial *ex parte* appointment of the Supervisory Representative in Charge, and also upheld the Board's decision on the merits in appointing the conservator. After carefully reviewing the evi-

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[2] Petitioner filed an action in the District Court challenging the Board's *ex parte* appointment of the Supervisory Representative and alleging that the Board's charges were false. The District Court dismissed the action on the ground that the Board had followed the proper procedures in appointing the Supervisory Representative and that, as to the merits of the case, petitioner had not exhausted its administrative remedies. *Beacon Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 143 F. Supp. 534 (E.D. Wis.).

dence (Pet. 35-52) the District Court concluded (Pet. 52): "The Board's finding that Beacon had a management which was unsafe or unfit to manage a Federal savings and loan association is clearly supported by the weight of the evidence as is evidenced by the series of unlawful and unsound transactions upon which Beacon's board permitted the Association to enter."

The court's opinion directed the Board "to prepare an order in conformity with this opinion" (Pet. 52). On June 9, 1958, the court entered an "Order for Judgment" which, after reciting the proceedings and the court's decision, denied petitioner's motion for summary judgment and (R. 45; Pet. 53):

> ORDERED, that defendant's motion for summary judgment dismissing the within action on its merits be and the same hereby is granted and that judgment be entered accordingly together with such costs as the defendant may be entitled to receive of the plaintiff.

On the same day, the clerk made the following notation in the civil docket (see Record):

> Order for Judgment—order granting deft's motion for summary judgment dismissing action on merits.

On July 10, 1958, petitioner filed in the District Court a petition seeking disbursements, legal fees and other expenses incurred in the proceedings (R. 48). On August 28, 1958, the District Court denied this petition (Pet. 55).

On September 3, 1958, the clerk of the court signed and entered in the docket, a document captioned "judgment" which "ADJUDGED and DECREED that the

complaint herein be dismissed upon its merits" (Pet. 57).

On September 19, 1958, petitioner filed a notice of appeal to the Court of Appeals "from the final judgment entered in this action on the 3rd day of September, 1958 * * * and from intermediate orders therein adverse to plaintiff," including the order of August 28, 1958 denying the petition for allowance of attorneys' fees and disbursements (Pet. 60).

On the Board's motion, the Court of Appeals dismissed the appeal on the merits as untimely.[3] It held that the order signed by the district court and entered in the civil docket on June 9, 1958 "finally disposed of the action on the merits" (Pet. 61-62); that the sixty-day period for appeal began to run on that date; and that the notice of appeal filed on September 19, 1958, more than 60 days after June 9, 1958, was therefore untimely. The Court of Appeals further stated that petitioner's arguments "on the merits," while not before it, had been rejected in another case by the Third Circuit, and that "[i]f called upon to do so, we would approve this holding * * *" (Pet. 62).

ARGUMENT

I

The Court of Appeals correctly held that the District Court entered its final judgment on June 9, 1958, and that petitioner's appeal, filed more than 60 days thereafter, was therefore untimely under Rule 73(a) of the Federal Rules of Civil Procedure.

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[3] The court affirmed the order of August 28, 1958, denying counsel fees and disbursements (Pet. 62). That ruling is not here challenged.

The judgment of June 9 contained all the "essential elements" of a final judgment, and evidenced the judge's intention that it should be his final act in disposing of the case on the merits. *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227, 232. It denied petitioner's motion for summary judgment, granted the Board's motion, and directed that judgment be entered accordingly, together with costs. After the court had signed this judgment, all that remained to be done was the ministerial act of "notation of [the] judgment in the civil docket", in accordance with Rules 58 and 79(a). Such docket entry was made by the clerk on the same day, and it "show[ed] * * * the substance of [the] judgment of the court" (Rule 79(a)). Thus, the June 9 judgment "put to rest the questions which the parties had litigated * * *. It was neither 'tentative, informal nor incomplete.'" *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 213.

The subsequent action of the clerk on September 3, 1958, in signing and entering "a more formal judgment, could not constitute a second final judgment in the case nor extend the time to appeal" (*Schaefer* case, *supra*, p. 233). The second judgment was not signed by the judge, but only by the clerk. It neither "disturbed [n]or revised legal rights and obligations which, by its prior judgment, had been plainly and properly set

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[1] Petitioner attempts to derive some support from the fact that the September 3 document was captioned "Judgment," whereas that of June 9 was captioned "Order for Judgment" (Pet. 7-8). But "the question of whether the time for [appeal] was to be enlarged cannot turn on the adjective which the court below chose to use in the caption of its second judgment" (*Minneapolis-Honeywell* case, *supra*, p. 212). See, also, *Erstling* v. *Southern Bell Telephone & Telegraph Co.*, 255 F. 2d 93 (C.A. 5), where the

tled with finality" (*Honeywell* case, *supra*, p. 212). Nor did the subsequent filing of a petition seeking award of attorneys' fees and disbursements extend the time for appeal. For even if the court had granted such petition, it would have had "no effect on the merits of the decision that we are now asked to review in the petition for certiorari" (*Honeywell* case, *supra*, p. 211).

Petitioner contends (Pet. 6-7), however, that the actions of the district judge and the parties subsequent to the entry of the June 9 judgment, in connection with its application for attorneys' fees, show that the judgment was not intended to be final. But the claim for attorney's fees was not even raised until July 10. When the June 9 judgment (which contained all the essential elements of finality, see *supra*, p. 6), was entered, therefore, it was intended to mark the end of the case. It is well settled that, once an effective, final judgment has been entered, neither the subsequent actions of the district court, nor waiver, nor the consent of both parties, can operate to extend the time for appeal. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449, 453; *United States* v. *Ragen*, 171 F. 2d 788 (C.A. 7); *Marten* v. *Hess, et al.*, 176 F. 2d 834 (C.A. 6); *Matteson* v. *United States*, 240 F. 2d 517 (C.A. 2).

In any event, the correctness of the ruling below that petitioner's appeal was untimely presents no question warranting review by this Court. For the Court of Appeals applied the criteria enunciated by this Court in *Schaefer* for determining whether a judgment is final for appeal purposes; the correctness of that

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court refused to draw any distinction between the fact that the first judgment (which it held final) was captioned "Order" and the second judgment was captioned "Final Judgment."

application involves only "a discrete instance[,] a particular nonrecurring set of circumstances" (Mr. Justice Frankfurter, dissenting, in the *Schaefer* case, *supra*, p. 236).

II

Since petitioner's appeal to the Court of Appeals was untimely, it is unnecessary to consider the substantive issues. However, we shall briefly show that, even if they were properly before this Court, they have no substance.

1. Petitioner attacks the preliminary action of the Board in appointing *ex parte* a Supervisory Representative in Charge, on the ground that the Act requires notice and hearing before such an appointment (Pet. 9-13). However, since the temporary appointment of the Supervisory Representative has now been superseded by the permanent appointment of the conservator (who was appointed after notice and hearing), any question with respect to the former appointment is moot. Moreover, as the district court correctly held in the earlier suit by petitioner against respondent (see note 2, *supra*), the Act gives the Board, upon finding that a federal savings and loan association is violating laws or regulations, the discretion either to appoint *ex parte* a temporary Supervisory Representative in Charge, or to follow the notice and hearing provisions required for a permanent appointment. *Beacon Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 143 F. Supp. 534, 536 (E.D. Wis.); cf. *Greater Delaware Valley Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 262 F. 2d 371, 373-374 (C.A. 3).

2. Petitioner, relying on the general rule that a receivership is to be regarded as a remedy of last resort, argues (Pet. 13-14) that, since the Act provides for less drastic remedies than appointing a conservator, the Board erred "as a matter of law" in appointing a conservator.

The Act, however, provides four grounds for the appointment of a receiver or conservator of a federal savings and loan association, and authorizes the Board to appoint one whenever it finds that any of those grounds exist. Section 5 (d)(2), *infra*, p. 13. Once the grounds for such an appointment are found to exist (as they were here), the Act leaves it to the Board's discretion to select the appropriate remedy. Here the Board did not abuse its discretion in concluding that, because of numerous and serious acts of mismanagement involved, the appointment of a conservator was necessary to protect the public interest. See *Fahey* v. *Mallonee*, 332 U.S. 245, 250-251.

3. Finally, petitioner's contention (Pet. 15-18) that the Boards' actions denied it due process of law is frivolous. The Board fully complied with the statutory procedures governing the appointment of a conservator, including notice and hearing and a full statement of reasons for its action, and the Board's ruling was fully subjected to judicial review. In the circumstances, petitioner's constitutional argument comes down to the contention that it has the right to operate as a federal savings and loan association free from regulation. The law is to the contrary. See *Fahey* v. *Mallonee*, *supra*, pp. 253-254; *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
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Attorneys.

AUGUST 1959.

APPENDIX

Section 5(d) of the Home Owners' Loan Act of 1933, as amended in 1954 (68 Stat. 634; 12 U.S.C. (Supp. II) 1464(d)) provides:

(d)(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (2) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted

by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any

matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia.

(2) The grounds for the appointment of a conservator or receiver for a Federal savings and loan association shall be one or more of the following: (i) insolvency in that the assets of such association are less than its obligations to its creditors and others, including its members; (ii) violation of law or of a regulation; (iii) the concealment of its books, records, or assets or the refusal to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Home Loan Bank Board; and (iv) unsafe or unsound operation. The Board shall have exclusive jurisdiction to appoint a Supervisory Representative in Charge, conservator, or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint ex parte and without notice a Supervisory Representative in Charge to take charge of said association and its affairs who shall have and exercise all the powers herein provided for conservators and receivers. Unless sooner removed by the Board, such Supervisory Representative in Charge shall hold office until a conservator or receiver, appointed by the Board after notice as herein provided, takes charge of the association and its affairs, or for six months.

or until thirty days after the termination of the administrative hearing and final proceedings herein provided, or until sixty days after the final termination of any litigation affecting such temporary appointment, whichever is longest. The Board shall have the power to appoint a conservator or receiver but no such appointment of a conservator or receiver shall be made except pursuant to a formal resolution of the Board stating the grounds therefor and except notice thereof is given to said association stating the grounds therefor and until an opportunity for an administrative hearing thereon is afforded to said association. Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. A conservator shall have all the powers of the members, the directors, and officers of the Federal association and shall be authorized to operate it in its own name or conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for any Federal savings and loan association, which shall have power as receiver to buy at its own sale subject to approval by the Board. With the consent of the association expressed by a resolution of the board of directors or of its members, the Board is authorized to appoint a conservator or receiver for a Federal association without notice and without hearing. The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations and for such associations in conservatorship and receivership and for

the conduct of conservatorships and receiverships. Whenever a Supervisory Representative in Charge, conservator, or receiver, appointed by the Board pursuant to the provisions of this section, demands possession of the property, business and assets of any association, the refusal of any officer, agent, employee, or director of such association to comply with the demand shall be punishable by a fine of not more than $1,000 or by imprisonment for not more than one year or both by such fine and imprisonment.

Rule 58 of the *Federal Rules of Civil Procedure* provides:

> Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 73(a) of the *Federal Rules of Civil Procedure* provides in part:

> (a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.
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> * * * * *

Rule 79(a) of the *Federal Rules of Civil Procedure* provides:

> (a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Admin-

istrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

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IN THE

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BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION,
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FEDERAL HOME LOAN BANK BOARD,
Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HORACE RUSSELL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 175.

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

FEDERAL HOME LOAN BANK BOARD,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Now comes the petitioner and replies to the brief for the respondent in opposition.

ARGUMENT.

I.

TIMELINESS.

The respondent undertakes to contend that this case differs from the *Schaefer* case (*U. S. v. F. & M. Schaefer Brewing Co.*, 356 U. S. 227), and he puts it on the ground that the petition for attorneys' fees was 'the first indication that anybody intended or treated the order of June 9 as interlocutory. The facts are that about the only difference between this case and the *Schaefer* case is that

the *Schaefer* case was a petition by the Government and this case is a petition by a private party. In both cases, an order was entered after a decision. In this case, it was called "Order for Judgment." In both cases, a final judgment was entered later. The question in both cases is which was the final judgment. The *Schaefer* case holds clearly that it depends upon the words of the order and the intention of the judge. In this case, the counsel at that time in charge of this case was seeking permission to petition for attorneys' fees before final judgment. It is clear enough from all of the circumstances that he was sitting there in the court when he signed the approval as to form and when the Court's "Order for Judgment" was signed. It seems entirely clear, from all of the circumstances, that not only counsel on the other side but the judge himself agreed to give him time to petition for attorneys' fees before the entry of the final judgment. He was careful enough to get consent from the other side in writing on the subject, as the original petition for certiorari shows. He could have then filed his notice of appeal, if the situation had been otherwise. It now would be very outrageous treatment of him and his client if the Court were to hold, by denial of the petition for the writ of certiorari, that the trial judge did not intend what the "Order for Judgment" tends to indicate, namely, that it was interlocutory, and that the judge did not intend what it is entirely clear from all of the circumstances that the judge indicated at that time he did intend to do.

The cases cited in the brief in opposition have been reviewed, but they merely hold what the *Schaefer* case holds, namely, that the judgment is a final judgment which clearly indicates on its face that it is a final judgment and the trial judge intends it to be such. We still contend that this case must turn on the reasoning in the *Schaefer* case.

II.

EX PARTE SEIZURE.

In response to the contention that it is reversible error to seize, *ex parte* and without notice, when there is no emergency and when an adequate remedy at law is available without seizure, the brief merely cites *Beacon Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 143 F. Supp. 534, and *Greater Delaware Valley Federal Savings & Loan Association* v. *Federal Home Loan Bank Board*, 262 F. 2d 371, cases. These cases, as cited, are not at all in point. They merely held that the plaintiff had no standing in court when it had not exhausted its administrative remedy.

Section 10(c) of the Administrative Procedure Act (5 U. S. C. 1009(c)) expressly provides that interlocutory administrative orders and action shall be reviewed in a case such as this. The respondent says that the question has become moot. This is not true. It is not good law to say that an administrative body such as this may seize $29,000,000 of private property, *ex parte* and without notice, and accord such scandalous treatment to private citizens as is evidenced in this case, without any right of review. And yet, the trial court and the Court of Appeals both say these parties have no right to review this completely vital, interlocutory action. They in effect hold that administrative bodies can treat citizens of the United States any way they please, provided that they continue the litigation until they produce some technical basis to sustain their final action. This is shocking Star Chamber procedure and is unconscionable. This ought not to become the law of the United States.

III.

SEIZURE WHEN THERE IS ANOTHER ADEQUATE REMEDY.

The petition says that it is error, as a matter of law, to ignore an Act of Congress and to seize private property when a simple, adequate and complete remedy at law is readily available. The respondent ignores the amendment of 1954 (12 U. S. C. 1464(d), as amended in 1954) and cites *Fahey* v. *Mallonee*, 332 U. S. 245. The said *Fahey* case is not in point here, because it was decided under the Act of 1933, when the Board had broad discretion and no other means of enforcing law and regulations. In 1954, the Congress amended that law and withdrew the blanket discretion of the Board and gave the Board an adequate remedy at law which Congress says it "shall" pursue and retained a discretionary power to seize. It is still good law in this country that it is wrongful to seize property when there is a simple, adequate and complete "remedy at law" readily available, as there was in this case. The Congress expressly provided that the Board "shall" give the notice and provide the administrative procedure for specific trial of issues. It is still error, as a matter of law, to seize $29,000,000 of other people's property for running over a red light or some minor infraction which could be readily corrected, as expressly directed by the Congress.

IV.

DUE PROCESS OF LAW.

Petitioner contends that it has not had due process of law.

Respondent again cites *Fahey* v. *Mallonee*, 332 U. S. 245, which was decided under the old law and is not in point under the 1954 amendment. Respondent does not discuss

the cases of *Service* v. *Dulles*, 354 U. S. 363; or *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, which were relied upon by the petitioner. In those cases, the United States Supreme Court held that when an administrative official voluntarily provides the public with a new and better remedy by regulation and then does not accord that procedure to the defendant, the same is not due process of law. In this case, the Congress repealed a law which gave this administrative body blanket discretion and then voluntarily substituted, for the protection of the public, a specific procedure for this Board to enforce specific law and regulations. It is clear that the public are entitled to what the Congress provided for the better protection of the public. Petitioners contend that to fail to give this petitioner the very valuable right accorded to it by Congress was a failure of due process of law.

CONCLUSION.

For the reasons specified above and in the petitioner's original petition filed herein, it is respectfully submitted that the writ of certiorari should be granted as prayed for.

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September 2, 1959.